# IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

## SPECIAL CIVIL APPLICATION No. 2564 of 1997

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE K.A.PUJ**

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| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? |
| 2 | To be referred to the Reporter or not ? |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? |
| 5 | Whether it is to be circulated to the civil judge ? |

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**CHIEF DISTRICT HEALTH OFFICER & 2 - Petitioner(s)**
**Versus**
**KANTABEN B MAKWANA - Respondent(s)**

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**Appearance :**
MR PV HATHI for Petitioner(s) : 1 - 3.
MR DG CHAUHAN for Respondent(s) : 1,

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**CORAM : HONOURABLE MR.JUSTICE K.A.PUJ**

**Date : 08/12/2005**

**ORAL JUDGMENT**

1.The petitioners, namely, District Panchayat, Jamnagar, through its Chief District Health Officer and others, have filed this petition under Articles 226 and 227 of the Constitution of India, praying for quashing and setting aside the award dated 2.12.1996 passed by the Presiding Officer, Labour Court, Jamnagar in Old Ref. (LCR)No.1522/1988 / New Ref. No. LCJ/1378/90.

2.This Court has admitted the petition and rule was issued on 3.12.1997. The Court has also stayed implementation of the award till the final disposal of the petition. The Court has also recorded the statement of Mr.P.V.Hathi, learned advocate appearing for the petitioners that the petitioners were ready to resume her to work for 3 hours in a day on a fixed salary of Rs.600/- as per Government Circular. The

Court has also observed that it would be for the respondent to accept the terms as they were being offered. In this view of the matter, the Court has not passed any order with respect to wages under Section 17-B of the I.D.Act, 1947.

3.The above order of this Court dated 3.12.1997 was challenged by the respondent before the Division Bench in LPA No.6/1998 and while disposing of the LPA vide its order dated 19.8.1998 the Division Bench has recorded the submissions of the parties and it was observed therein that the appellant / present respondent has been reinstated in service and has been directed to work at Latipur, which is a place near to the residence of the appellant. The Court, therefore, observed that the grievance of the appellant was redressed to some extent and in view of the changed circumstances, the Court did not think that the respondent /

present petitioner should be directed to pay any back wages to the appellant for the time being.

4.The brief facts which gave rise to the present petition are that the respondent workman was working as a part time sweeper at Primary Health Center in village Latipur. The said appointment was made by Medical Officer, who was competent to make such part time appointments only, on lumpsum salary of Rs.225/- per month, which order was approved by the District Health Officer on specific condition that her appointment was temporary, adhoc etc. The respondent workman has worked as part time sweeper from 1.7.1980 to 16.11.1987. When she was working as part time sweeper, she made an application on 16.7.1986 to the District Development Officer to give her full time employment. The said application was

forwarded to the Taluka Development Officer on 16/23.11.1987. The Taluka Development Officer appointed her in the regular time-scale post for a period of 60 days subject to the decision of the District Panchayat. The Taluka Development Officer passed an order on 25.1.1988 relieving her from service from 29.1.1988 and she ceased to be in employment from that date. On 10.6.1988, the Assistant Labour Commissioner referred the matter to the Labour Court, Rajkot with the specific issue of her reinstatement to her original post with back wages. In other words, the termination order of 25.1.1988 was challenged. The Labour Court, Jamnagar, vide its award dated 2.12.1996 directed the petitioner to pay 90% back wages of full pay from 1988 to 1996 though she was admittedly a part-timer.

5.Being aggrieved by the said order of the Labour

Court, the petitioners have filed this petition by invoking writ jurisdiction of this Court under Articles 226 and 227 of the Constitution of India.

6.Mr. P.V. Hathi, learned advocate appearing for the petitioners has submitted that the Presiding Officer of the Labour Court has committed an obvious error in holding that Sec.2(00) of the I.D.Act does not apply though it was proved on record that the respondent workman was appointed by an order dated 16.11.1987 for a specified period of 60 days and, therefore, the order of termination dated 25.1.1988 was not retrenchment within the meaning of the I.D.Act. He has, therefore, submitted that reinstatement to the post and payment of back wages on that basis are without jurisdiction, illegal and improper and requires to be set aside.

7.Mr. Hathi further submitted that the learned Presiding Officer of the Labour Court has committed an obvious error in travelling beyond the reference made under Section-10 of the I.D.Act by the Assistant Commissioner of Labour in as much as by holding that the workman was required to be continued on a permanent post because of her length of service ignoring the fact that her appointment was made for a specified period and was otherwise not made in the manner prescribed by the statutory rules. Therefore, the award requires to be quashed and set aside.

8.Mr. Hathi further submitted that learned Presiding Officer of the Labour Court has committed an obvious error in holding that there was breach of Sec.25F of the I.D.Act and that the termination was void ab initio though

the workman was appointed, for a specified period and, therefore, on expiry of the said period, such termination cannot be termed as retrenchment within the meaning of Sec.25F of the Act.

9.Mr.Hathi, further submitted that the learned Presiding Officer of the Labour Court has committed an obvious error in awarding back wages as if the respondent was in regular pay scale and a permanent employee, even though (1) the respondent workman had not worked on any post, part-time or full time, from 29.1.1988 till 2.12.1996 and was working as sweeper elsewhere as admitted by her; and (2) though there was no other post of sweeper at Latipur and one Chaku Puna was already holding the said post from 1.7.1989. Therefore, the order of payment of back wages made by the Labour Court after converting the part-time employee as a

full time employee and awarding 90% of the back wages is totally unreasonable and improper.

10.In support of his submission Mr.P.V.Hathi, relied on the judgment of Hon'ble Supreme Court **in case of State of Rajasthan and others vs. Rameshwar Lal Gahlot, reported in AIR 1996 Supreme Court 1001**, wherein Hon'ble Supreme Court held that when the appointment is for a fixed period, unless there is finding that power under Clause (bb) of Section 2(oo) was misused or vitiated by its malafide exercise, it cannot be held that the termination is illegal. In its absence, the employer could terminate the services in terms of the letter of appointment unless it is a colourable exercise of power.

11.Mr. Hathi further relied on the decision of Hon'ble Supreme Court **in the case of Birla VXL**

**Ltd., vs. State of Punjab & Others, reported in 1996 SC 234**, wherein Hon'ble Supreme Court observed that by terms of appointment order employer is entitled to bring temporary employment to an end and such termination is not open to challenge when it is not for any misconduct and no stigma is cast.

12.Mr. Hathi has further relied on the decision of Hon'ble Supreme Court in the case of **Mukand Ltd., vs. Mukand Staff & Officers' Association, reported in 2004 Supreme Court Cases (L & S) 798**, wherein Hon'ble Supreme Court has held that the Industrial Tribunal is a creature of the reference and hence it cannot adjudicate matters beyond the purview of the dispute referred to it. The Tribunal acting within its jurisdiction under ID Act could not have adjudicated the dispute insofar as it related to non-workmen. It was further held that the

employer and the employees could not, by their conduct in concluding settlements, create or confer such jurisdiction on the Industrial Tribunal. The Court further held that the Tribunal's finding that the Company was estopped from contending that the employees were not workmen under the Act and High Court's finding upholding the Tribunal's award on the ground that there was community of interest between the workmen and non-workmen as they worked and functioned in the same grade and that the Company having concluded settlements covering both categories of employees, the workmen could espouse the cause of non-workmen. This finding was held as erroneous as in the absence of such pleadings by the respondent Association such findings could not have been given.

13.As far as back wages are concerned Mr.Hathi

relied on the decision of Hon'ble Supreme Court **in the case of General Manager, Haryana Roadways vs. Rudhan Singh, reported in 2005 Supreme Court Cases (L&S) 716**, wherein Hon'ble Supreme Court has held that there is no rule of thumb that in every case where Industrial Tribunal gives finding that termination of service was in violation of S.25-F, ID Act, 1947, entire back wages should be awarded. A host of factors like the manner and method of selection and appointment i.e., whether after proper advertisement of the vacancy or inviting applications from the employment exchange, nature of appointment, namely, whether ad hoc, short term, daily wage, temporary or permanent in character, any special qualification required for the job and the like should be weighed and balanced in taking a decision regarding award of back wages. One of the important factors, which has to be taken into

consideration, is the length of service, which the workman had rendered with the employer. If the workman has rendered a considerable period of service and his services are wrongfully terminated, he may be awarded full or partial back wages keeping in view the fact that at his age and the qualification possessed by him he may not be in a position to get another employment. However, whether the total length of service rendered by a workman is very small, the award of back wages for the complete period i.e., from the date of termination till the date of the award, which our experience shows is often quite large, would be wholly inappropriate. Another important factor, which requires to be taken into consideration is the nature of employment. A regular service of permanent character cannot be compared to short or intermittent daily-wage employment though it may be for 240 days in a calendar year.

14.Based on the aforesaid factual as well as legal submissions and considering the judicial pronouncements cited, Mr.Hathi, submitted that the award passed by the Labour Court is not sustainable and is without any law and the same is, therefore, required to be quashed and set aside.

15.Mr. D.G. Chauhan, learned advocate appearing for the respondent workman on the other hand submitted that the award passed by the Labour Court is based on evidence and after appreciation of the evidence the Labour Court has come to the conclusion, which cannot be interfered with while exercising the extraordinary powers under Article 227 of the Constitution of India. Mr.Chauhan further submitted that the Labour Court has dealt with each of the issues raised before it very

extensively and after considering the correct legal position and judicial pronouncements on the subject has come to the correct conclusion that the termination order, which was passed by the petitioner is in violation of the provisions contained under Section 25-F of the ID Act, and hence the said order was rightly quashed and set aside, and the respondent workman was liable to be reinstated to her original post with continuity of service and 90% of back wages.

16.Mr. Chauhan further submitted that the Labour Court has come to the specific finding that the appointment order issued by the petitioner is malafide and it is nothing but victimization and in this view of the matter the provision contained under Clause (bb) of Section 2(oo) are not applicable and the petitioner has not complied with the provision contained in

Section 25-F of the I.D. Act. Mr.Chauhan further submitted that the respondent workman was appointed in the year 1980. She has worked for more than 7 years. Despite the fact that there was permanent vacancy and when the respondent workman has asked for permanency benefits, malafide appointment was issued to her for the period of 60 days and on completion of the period of 60 days the services of the respondent workman were terminated, even though there was no communication from the District Health Officer. He has, therefore, submitted that the entire exercise undertaken by the petitioner was malafide and it amounts to unfair labour practice and hence this specific finding given by the Labour Court cannot be interfered with by this Court while exercising extraordinary powers under Article 227 of the Constitution of India.

17. In support of his submission he relied on the decision of Division Bench of this Court **in the case of Surat Mahila Nagrik Sahakari Bank Ltd., vs. Mamtaben Mahendrabhai Joshi, reported in 2001 (2) GLH 447**, wherein this Court has observed that in fact, to continue a person for a very long time under temporary orders may amount to Unfair Labour Practice within the meaning of the Fifth Schedule of the Industrial Disputes Act, 1947. Clause – 10 of the Fifth Schedule lays down that employment of workmen as "badlis", casuals or temporaries and continuing them as such for years, with the object of depriving them of the status and privileges of permanent workmen, may amount to Unfair Labour Practices. The Court further observed that the Industrial Court has fund that the action of the Management was deliberate and intentional not to give status of permanency to the present respondent with an

object of depriving her the benefit of law. The Court further observed that though it is, no doubt, true that in case of a fixed term appointment, in view of Section 2(oo)(bb), the provisions of Section 25-F may not have any application, the Court, exercising powers under the Industrial Disputes Act, can very well go into the questions whether the powers are exercised bona fide, whether it is by way of victimization or whether it is passed solely with the object of depriving the employee the benefit available under the Industrial Disputes Act. It cannot be said that even if the order is passed by way of victimization or in an arbitrary manner, or even if it is an unfair labour practice, then also simply because the appointment is for a fixed term, provisions of Section 25-F are not looked into at all. The Court, therefore, came to the conclusion that the said provision cannot be brushed aside if

it is brought to the notice of the Court that the order in question was passed by way of victimization or has not been passed with a bona fide intention. When the appellate Court has specifically come to the conclusion, on appreciation of the evidence, it would hardly make any difference whether the concerned employee has pleaded that case in her application or not.

18.Mr. Chauhan has further relied on the decision of the Hon'ble Supreme Court **in the case of Sadhana Lodh vs. National Insurance Co. Ltd., and Another, reported in (2003)3 Supreme Court Cases 524**, wherein the Hon'ble Supreme Court has observed that the supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is confined only to see whether an inferior Court or tribunal has proceeded within its parameters and not to

correct an error apparent on the face of the record, much less of an error of law. In exercising the supervisory power under Article 227 of the Constitution, the High Court does not act as an appellate court or a tribunal. It is also not permissible to a High Court on a petition filed under Article 227 of the Constitution to review or reweigh the evidence upon which the inferior court or tribunal purports to have passed the order or to correct errors of law in the decision. Mr.Chauhan, therefore, submitted that once the Labour Court has come to the conclusion on the basis of appreciation of evidence and has arrived at particular finding that the finding of fact cannot be disturbed or interfered by this Court while exercising power under Article 227 of the Constitution of India.

19.After having heard the learned advocates for

the respective parties and after having gone through the award passed by the Labour Court and after having considered the submissions made before the Court as well as the authorities relied upon by the respective parties, the Court is of the view that the Labour Court has committed obvious error in directing the petitioner to reinstate the respondent workman as full-time sweeper with continuity of service and 90% back wages from the date of termination till the date of reinstatement. It is an admitted position that the respondent workman was working as a part-time sweeper from 1.7.1980 to 16.11.1987. It is also an admitted position that the respondent workman was appointed on a regular time-scale post as permanent sweeper for a period of 60 days only. It is also an admitted position that no procedure has been followed by the petitioner while appointing the respondent

workman on a regular post for a period of 60 days. As per the Full Bench decision of this Court, the Panchayat, local authorities have no right to appoint any person on a regular post without following due procedure of law. In the opinion of this Court, the appointment itself of the respondent workman on regular post is illegal. However, it was for the temporary period of 60 days only and hence, the same was terminated on expiry of the said period. The Labour Court, therefore, could not have directed the petitioner to reinstate the respondent workman as a full time sweeper with continuity of service and 90% of back wages. At the same time, the petitioner has also committed an error, as after termination of service of the respondent workman as a full time sweeper on expiry of period of 60 days, the respondent workman could have been reverted to the post as a part time sweeper as she was

there on this post for the last about more than 7 years. The Court is, therefore, of the view that so far as termination of the respondent workman as full time sweeper on expiry of period of 60 days is concerned, the same would squarely fall within the ambit of provisions contained in Clause (bb) of Section 2(00) and hence the provisions of Section 25-F are not applicable. However, so far as the services of respondent workman as a part-time sweeper are concerned, she was working as a part time sweeper for more than 7 years and if such services are terminated alongwith the termination of service as full time sweeper, the same would definitely affect the respondent workman and hence in that case the petitioner is bound to comply with the provisions contained in section 25-F of the I.D.Act, which has not been admittedly complied with. In that view of the matter, this Court is of the view

that the respondent workman is entitled to be reinstated to her original post i.e., the post of part time sweeper from the date of termination till the date of reinstatement.

20.It has come on record that pursuant to the order of this Court passed by the learned Single Judge on 3.12.1997 and the order of Division Bench passed in LPA No.6/1998 on 19.8.1998 the respondent workman has been working as part time sweeper on monthly fixed salary of Rs.600/- for 3 hours work in a day. The question which remains for the Court to decide is as to whether for the intervening period i.e., from the date of termination till the date of reinstatement as part time sweeper by virtue of interim order passed by this Court, the respondent is entitled to back wages. Since the Court is of the view that the respondent workman's termination as part time

sweeper is illegal and without following the provisions contained in the I.D. Act, the respondent workman is certainly entitled to be reinstated from the date of termination till the date of reinstatement and for this period she is also entitled to back wages. However, it has come on record that during this period the respondent workman was gainfully engaged and she has been earning about Rs. 65/- for the service rendered by her at two places as a part time sweeper. Considering this fact, which has not been taken into consideration by the Labour Court while awarding back wages of 90%, this Court is of the view that interest of justice would better be served if the respondent workman is awarded back wages to the extent of 50% for the period of termination till the date of her reinstatement as part time sweeper, pursuant to the interim order passed by this Court.

21.The Court is further of the view that no proper procedure has been followed by the petitioner while appointing the respondent workman as a full time sweeper and when her services were terminated after the expiry of 60 days, it cannot be said that the said action of the petitioner was malafide or it would amount to victimization. The order passed by the Labour Court is required to be interfered with and accordingly the said order is modified to the extent that the respondent workman is entitled to be reinstated as a part time sweeper right from the date of her termination as full time sweeper and till the date of reinstatement and she is also entitled to the back wages to the extent of 50% for this period. The Court is of the view that since the respondent workman has worked for more than 25 years as a part time sweeper, the petitioner

may consider the case of the respondent workman for her appointment as full time sweeper and as and when vacancy arises, her case may be considered sympathetically and in accordance with law.

22.With the aforesaid directions and observations the award passed by the Labour Court is modified to the above extent. This petition is accordingly allowed. Rule is made absolute to the aforesaid extent without any order as to costs.

(K. A. PUJ, J.)

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